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Ida-Therm, LLC v. Bedrock Geothermal, LLC Respondent's Brief Dckt. 39108

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDA-THERM, LLC; Plaintiff-Counterdefendant-Appellant, vs. BEDROCK GEOTHERMAL, LLC; Defendant-Counterclaimant-Respondent,	)	**Supreme Court Docket No. 39108-2011**

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

The Honorable Dane H. Watkins, Jr., District Judge, Presiding

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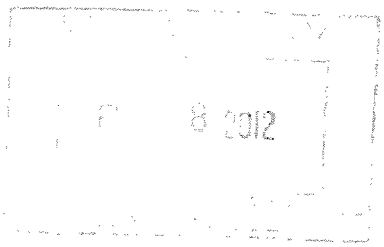

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I. Statement of the case.

This case involves the question of whether a reservation of "all the oil, gas, and minerals, in, on, or under the surface of said lands . . ." in a 1946 warranty deed included a reservation of the geothermal resources underlying the deeded property. There is no extrinsic evidence regarding the intent of the parties at the time the warranty deed was created.

II. Course of proceedings.

Ida-Therm's description of the course of the proceedings is accurate.

III. Statement of facts.

On or about March 19, 1946, Arthur J. Bell and his wife Vinnie O. Bell conveyed land to C.C. Mann by a warranty deed ("the 1946 Bell Deed"). In the 1946 Bell Deed, Arthur and Vinnie Bell reserved to themselves "all the oil, gas, and minerals, in, on, or under the surface of said lands . . . ." R, Vol. I, p. 166.

The individual Defendants in the action below are the successors of Arthur and Vinnie Bell, and are now the owners of the oil, gas and mineral rights reserved in the 1946 Bell Deed. Defendant/Counterclaimant/Respondent Bedrock Geothermal, LLC ("Bedrock") leased geothermal rights for the real property involved in the 1946 Bell Deed from the individual Defendants. R, Vol. I, pp. 13-16.

Plaintiffs Mann and Kolbet in the action below are the holders of the surface estate pursuant to the 1946 Bell Deed, and Plaintiffs asserted in the Complaint below that the deed's reservation of mineral rights did not include geothermal rights. Based on this position, they entered into geothermal leases with Plaintiff/Counterdefendant/ Appellant Ida-Therm, LLC ("Ida-Therm"). R, Vol. I, pp. 11-12.

Defendants denied Plaintiffs' claim, and Bedrock counterclaimed for declaratory judgment that it properly leased the geothermal rights for the subject property by virtue of the individual Defendants' acquisition of the mineral rights reserved in the 1946 Bell Deed, declaratory judgment that Plaintiff Ida-Therm LLC's geothermal rights leases from Plaintiffs Mann and Kolbet were void as a result, and judgment quieting title to the geothermal resources in it as against Plaintiffs. R, Vol. I, p. 121.

In response to discovery requests, Plaintiffs acknowledged that they possess no extrinsic evidence regarding the grantors' intent at the time of creation of the 1946 Bell Deed. R, Vol. I, pp. 187-188.

Bedrock moved for summary judgment on February 17, 2011. R, Vol. I, p. 137. In its Memorandum Decision and Order dated May 26, 2011, the District Court granted Bedrock's motion. R, Vol. II, p. 251.

After discussing the fact that most states have found the term "mineral" to be unambiguous and read broadly, the District Court concluded that it would be "injudicious to conclude that the term mineral is ambiguous." Such a holding, the District Court stated, would "unnecessarily encourage litigation to determine the scope of grants or reservations similar to that of the Bell Deed." It reviewed with approval authority from other states holding that: (a) a reservation of "all minerals" imports an intent to convey only the surface rights and sever it from the mineral estate, meaning all commercially valuable substances separate from the soil; (b) a "functional" approach focused on the purposes and expectations generally attendant to mineral estates and surface estates was preferable over a "mechanistic" approach based on textbook definitions of the term "mineral"; (c) functionally, geothermal resources are more like oil, gas and coal, are not necessary for the enjoyment of the surface estate, and may be exploited without

destroying the surface estate; and (d) under federal law, geothermal resources are generally grouped with other minerals. The District Court rejected Defendants' argument that geothermal resources were not reserved because they were not specifically mentioned, reasoning that the term "minerals" is a general term describing a category of resources, and if that category could be interpreted to include geothermal resources, they were reserved. The District Court also rejected Defendants' argument that the decision in Stucki v. Parker, 108 Idaho 929 (1985), stands for the proposition that the surface estate may only be severed from the mineral estate by an express grant or reservation of the "surface." Finally, the Court rejected Defendants' assertion that the definition of "geothermal resources" used in the Idaho Geothermal Resources Act, I.C. § 42-4002, controls, agreeing with Bedrock that the statutory definition is not applicable to the interpretation of a deed which pre-dates the statute and that the Idaho Legislature has acted inconsistently, *including* geothermal resources within the meaning of "minerals" in I.C. § 47-701. R, Vol. II, pp. 251-269.

IV. Issues presented on appeal.

1. Did the District Court correctly conclude that the reservation in the 1946 Bell Deed of "all the oil, gas, and minerals, in, on, or under the surface of said lands . . . ." unambiguously included geothermal resources?

2. Did the District Court correctly conclude that the decision in Stucki v. Parker is not relevant because it expressly deals only with a limited grant of the surface estate and does involve interpretation of the term "minerals" or the scope of a reservation of all minerals?

3. Did the District Court correctly conclude that the Geothermal Resources Act, enacted well after the 1946 Bell Deed and dealing with the regulation of the development of

geothermal resources, is not relevant to the scope of a mineral reservation in a private conveyance?

V. Standard of review.

Ida-Therm's statement of the standard of review is accurate.

VI. Argument.

A. The reservation of all "minerals . . . in, on, or under the surface" in the 1946 Bell Deed unambiguously evidences the general intent to sever the surface estate from rights to commercially valuable substances, including geothermal rights.

The sole issue in this case is whether the reservation of mineral rights in the 1946 Bell Deed included geothermal rights (in which case such rights are rightfully owned by the individual Defendants and leased to Bedrock).

The Idaho Supreme Court has summarized the process for interpreting a deed:

> In interpreting a deed of conveyance, the primary goal is to seek and give effect to the real intention of the parties. *See Gardner v. Fliegel,* 92 Idaho 767, 770, 450 P.2d 990, 993 (1969); *Bumgarner v. Bumgarner,* 124 Idaho 629, 637, 862 P.2d 321, 329 (Ct. App. 1993). Where a deed is ambiguous, interpretation of the grantor's intent is a question of fact determined from the instrument itself, as well as from the surrounding facts and circumstances. *See Latham v. Garner,* 105 Idaho 854, 857, 673 P.2d 1048, 1051 (1983); *Dille v. Doerr Dist. Const.,* 125 Idaho 123, 125, 867 P.2d 997, 999 (Ct. App. 1993). Where a deed is unambiguous, however, the parties' intent must be ascertained from the language of the deed as a matter of law without resort to extrinsic evidence. *See id.; see also Gardner,* 92 Idaho at 770, 450 P.2d at 993 (stating that if the language of a deed is plain and unambiguous the intention of the parties must be ascertained from the deed, and parol evidence, that is, documentary, oral or real evidence extrinsic to the deed itself, is not admissible to ascertain intent); *Hines v. Hines,* 129 Idaho 847, 854, 934 P.2d 20, 27 (1997) (noting that "there is no need to resort to extrinsic evidence to interpret or modify the terms of what appears to be a clearly written document").

C & G, Inc. v. Rule, 135 Idaho 763, 766 (2003). It is undisputed in this case that no extrinsic evidence of the grantor's intent.

Ida-Therm first contends that the 1946 Bell Deed's reservation of all minerals unambiguously did not include geothermal resources. It reaches this conclusion based on the fact that the Deed reservation does not explicitly include the words "geothermal resources." This argument was correctly rejected by the District Court. Ida-Therm's assertion that the "plain meaning" of "minerals" does not include geothermal resources is circular and unsupported by any authority. It begs the question of what "minerals" means, without ever attempting to answer that question other than to state in conclusory fashion that it does not include geothermal resources.

Ida-Therm's argument ignores the extremely broad nature of the reservation in the 1946 Bell Deed. Read in context, it is clear that the reservation is intended to cover every valuable substance that may be removed anywhere from the land without destroying the surface estate, through any available means. The Deed first reserves "all the oil, gas and minerals" and expands upon this reservation by including the modifier "in, on, or under, the surface of said lands[.]" It then goes on to make clear that it includes "all the rights of ownership therein," the right of removal of all such substances, whether by "mining, developing or operating," and the right of "erection [on the property] of "all necessary buildings, pipelines, machinery and equipment necessary in and about the business of mining, developing or operating, for any of said products[.]" This broad language supports the conclusion of a general intent by the parties to sever the surface and subsurface estates, inclusive of geothermal resources.

Courts in other jurisdictions have long recognized that a reservation of "all minerals" is intended to entirely sever the surface and subsurface estates. For example, the

Kentucky Supreme Court stated over seventy years ago that a reservation of "all minerals" "clearly imports an intention to convey only the surface rights and to reserve all minerals. In other words, the deed separated the mineral estate from the surface." Maynard v. McHenry, 271 Ky. 642, 113 S.W.2d 13 (1938). Similarly, the Court in Spurlock v. Santa Fe P. R.R., 143 Ariz. 469, 694 P.2d 299 (Ct. App. 1984), stated, "We believe a reservation of 'all minerals whatsoever' reflects a *general* intent of the parties to sever the surface estate from the underlying mineral estate," and reasoned that such a reservation "indicates that the parties intended to create two distinct, coexisting, and individually valuable estates. Thus, the grantor retains ownership of all commercially valuable substances separate from the soil, while the grantee assumes ownership of a surface that has value in its use and enjoyment." 694 P.2d at 308.

The rule that a reservation of minerals establishes a general intent to sever the surface and subsurface estates has a long and established history. E.g., Northern P. R. Co. v. Soderberg, 188 U.S. 526, 536 (1903) (noting that in Hext v. Gill, L.R. 7 Chan. App. 699 (1872), the House of Lords held that "every substance which can be got from underneath the surface of the earth for the purpose of profit," was a mineral, "unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning").

In this case, Arthur and Vinnie Bell reserved to themselves in the 1946 Bell Deed all "oil, gas, and minerals, *in, on, or under the surface* of said lands . . . ." R, Vol. I, p. 166. The reference to the "surface," in juxtaposition to the "oil, gas and minerals in, on or under" the surface being reserved, further evidences the intent to sever the surface estate from the mineral estate. Including geothermal resources in the conveyed "surface" rather than the reserved "minerals" would be illogical and an unreasonable interpretation of the 1946 Bell Deed.

In Spurlock, the Arizona Court of Appeals observed that the approach of finding the term "minerals" ambiguous invites unending litigation and other problems. Spurlock v. Santa Fe P. R.R., 143 Ariz. 469, 694 P.2d 299 (Ct. App. 1984). The court catalogued those jurisdictions which in which courts had found the term "minerals" to be ambiguous, and those in which it had been found to be unambiguous (and read broadly), and noted:

> Courts that hold mineral to be an ambiguous term are often thrust into a complex and hopeless search for the "true intentions" of the original contracting parties. With the passage of decades and a series of mesne conveyances, this task can be impossible. And, as many courts have noted, attempting to discover the parties' specific intent regarding a substance that was unknown to anyone at the time of the original conveyance is antilogical. *E.g., Northern Nat. Gas Co. v. Grounds*, 441 F.2d 704, 714 (10th Cir, *cert. denied*, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267 (1971). The most consistent results produced by these cases are title uncertainty and the need to litigate each mineral reservation to determine what substances it encompasses.

694 P.2d at 307. The court concluded that the better approach was to read the term "minerals" as unambiguous and indicating a broad intent to sever the surface and subsurface estates, noting that under this approach "title uncertainty is minimized and courts are able to avoid the tortuous process of attempting to discover the parties' specific intent." Id., citing Moser v. United States Steel Corp., 676 S.W.2d 99 (Tex.1984).

A panel of the Tenth Circuit Court of Appeals similarly noted the benefits of treating the term "minerals" as unambiguous:

> The policy considerations in favor of this interpretation are considerable. An established rule of law provides a reliable means of ascertaining mineral ownership. This certainty is important because of the heavy investment of capital required to develop petroleum and other mineral resources. Without an established rule of law, the courts would necessarily be called upon to interpret numerous reservations. This is evident from the series of cases that result in states following Arkansas authority. With every new

> technology that develops a use for a particular gas or hard rock mineral, resort is made to the courts. Conservation of judicial resources is another valuable advantage of [this] rule.

Amoco Prod. Co. v. Guild Trust, 636 F.2d 261, 265 (10th Cir.1980), cert. denied, 452 U.S. 967, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981).

Here, where all minerals, oil and gas were reserved in the 1946 Bell Deed, a severance of the surface and subsurface estates was accomplished, and the grantee did not obtain the geothermal rights. A reservation of all minerals is generally recognized as accomplishing a severance of the surface and subsurface estates, with the subsurface estate holder owning all commercially valuable substances separate from the soil. See, e.g., Spurlock, 674 P.2d at 308; Calvert Joint Venture #140 v. Snider, 373 Md. 18, 50, 816 A.2d 854, 872 (2003). The District Court correctly reached the same result here.

B. The weight of authority supports the conclusion that "minerals" unambiguously includes geothermal resources, because such resources are functionally similar to other minerals and are not necessary to the use and enjoyment of the surface estate, and because a broad reading of "minerals" encourages title certainty.

While no Idaho appellate court has reached the issue, a number of other courts have concluded that the term "minerals" includes geothermal resources. For example, in Geothermal Kinetics, Inc. v. Union Oil Co. of Cal., 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (Ct. App. 1977), the court held that a grant of "all minerals in, on or under" the subject property included geothermal resources. The court rejected the surface estate owner's contention that a geothermal resource is not steam, rocks or the underground reservoir but the heat transported to the surface by means of steam, and that a "mineral" must have physical substance while heat is merely a property of a physical substance. The court accepted the mineral estate owner's argument that since normally the owner of the mineral estate seeks to extract valuable resources

from the earth, whereas the surface owner generally desires to utilize land and such resources as are necessary for his enjoyment of the land, the geothermal resources should follow the mineral estate. 141 Cal. Rptr. at 880. In reaching this conclusion, the court described the nature of geothermal resources and geothermal energy, and the manner in which heated steam is transported to the surface and made ready to exploit. The court then analogized geothermal resources to oil, gas and other minerals:

> Purification of the condensed steam so as to render it safe for agricultural or domestic purposes is not economically feasible. Geothermal resources are not necessary or useful to surface owners, other than as a source of electricity. The utilization of geothermal resources does not substantially destroy the surface of the land. The production of the energy from geothermal energy is analogous to the production of energy from such other minerals as coal, oil and natural gas in that substances containing or capable of producing heat are removed from beneath the earth. In fact, the wells used for the extraction of the steam are similar to oil and gas wells.

Id. at 881. Moving on to interpretation of the deed, the court observed that as a general rule, a grant or reservation of minerals included all minerals found on the premises *whether known to exist or not*, and that the exploitation of geothermal resources would not substantially destroy the surface. The court reasoned that geothermal resources were distinguishable geologically from the ground water system. It concluded:

> The parties to the 1951 grant had a general intention to convey those commercially valuable, underground, physical resources of the property. They expected that the enjoyment of this interest would not destroy the surface estate and would involve resources distinct from the surface soil. In the absence of any expressed specific intent to the contrary, the scope of the mineral estate, as indicated by the parties' general intentions and expectations, includes the geothermal resources underlying the property.

Id. at 882.

Similarly, in R&R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1076 (Utah 1997), the Utah Supreme Court quoted the Geothermal Kinetics court's statement: "The production of energy from geothermal resources is analogous to the production of energy from such other mineral resources as coal, oil and natural gas in that materials containing energy are extracted from the earth and transported to facilities where this energy is transformed into electrical energy. The fact that extracted coal, oil and natural gas contain chemical energy while geothermal resources contain thermal energy is not significant; uranium ore is not denied the status of a mineral because it contains nuclear energy instead of chemical energy."

The U.S. Ninth Circuit Court of Appeals reached a similar conclusion, when it stated: "Salt water and geothermal steam and brines should be held the property of the mineral owner who owns such substances as oil, gas and coal, since the functions and values are more closely related. Geothermal steam is a source of energy just as fossil fuels such as oil, gas and coal are sources of energy." U.S. v. Union Oil Co., 549 F.2d 1271, 1279 (9th Cir. 1977) (citing Olpin, *The Law of Geothermal Resources*, 14 Rocky Mtn. Min. L.I. 123, 140-41 (1968)). The Tenth Circuit also has concluded that geothermal steam falls within a reservation of minerals under the Stock-Raising Homestead Act, as did the Ninth Circuit in Union Oil. Rosette Inc. v.

United States, 277 F.3d 1222 (10th Cir. 2002), cert. denied, 537 U.S. 878 (2002), although these cases involve the interpretation of a federal statute rather than a deed.[1]

The reasoning of the courts in these cases is applicable here, particularly given the broad nature of the reservation.

C. The District Court correctly concluded that the decision in *Stucki v. Parker* is not relevant.

Ida-Therm next asserts, based on this Court's decision in Stucki v. Parker, 108 Idaho 929 (1985), that a reservation of "all minerals" does not indicate the intent to sever the surface and subsurface estates, and apparently that such a severance could only occur by a grant or reservation of the surface itself. Ida-Therm avoids discussion of the abundant authority provided by Bedrock to the contrary. In any case, Stucki does not hold as Ida-Therm suggests.

In Stucki, the grantor expressly conveyed the "surface" of certain real estate, but reserved "all of the phosphate and phosphate rock in the lands above-described." 108 Idaho at 929. The issue in the case was whether the grantee had also acquired all of the mineral rights except for phosphate and phosphate rock. This Court ruled, sensibly, that an express conveyance of only the surface would be meaningless if the grantee were held to have also received all subsurface rights except for the phosphate substances. According to the Court, because the grantor "elected to convey specifically the surface rights," it "effectively limited the conveyance to a transfer of the surface separate and apart from the subsurface" and that the reservation was

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[1] Most courts to consider the issue have held that oil and gas are included within the meaning of "minerals" as used in grants and reservations. See, e.g., Roth v. Huser, 147 Kan. 433, 76 P.2d 871 (1938); Murray v. Allred, 100 Tenn. 100, 43 S.W. 355 (1897). In comparison, those decisions in which the term "minerals" is found not to include sand and gravel (the heavily majority rule) often base their holding on the fact that exploitation of the sand and gravel would require destruction of the surface, and therefore unreasonably infringe upon the surface estate, see, e.g., Norken Corp. v. McGahan, 823 P.2d 622 (Alaska 1991). Geothermal resources are obviously more akin to oil and gas than to sand and gravel, as they are accessed and extracted through well drilling, and do not require substantial destruction of the surface to exploit.

only a limitation on the surface estate that was conveyed. Id. The Court did *not* hold that using the word "surface" in the granting language is the only way to sever the surface and subsurface estates, and the case has nothing at all to do with the issue here: what is included in the meaning of "all minerals" in a deed reservation. Stucki deals only with the effect of an expressly limited granting clause, and is not relevant to the scope of the reservation in this case.[2]

While Ida-Therm's reliance upon the Stucki decision is misplaced, it is worth noting that, in fact, the word "surface" is distinguished in the reservation language of the 1946 Bell Deed. The reservation provides that the grantors reserve "all the oil, gas, and minerals in, on or under, the surface of said lands, and all the rights of ownership therein . . ." Contrary to Ida-Therm's position (but consistent with its posture regarding the importance of the word "surface"), this language illustrates the intent to sever the surface and subsurface estates.[3]

D. The *Treasure Valley Concrete* decision is not relevant, and resort to extrinsic evidence in every instance where a reservation of "all minerals" is made is unwieldy and encourages disputes.

Next, Ida-Therm asserts that this Court's decision in Treasure Valley Concrete, Inc. v. State, 132 Idaho 673 (1998) is "instructive" and should lead the Court to conclude that a reservation of "all minerals" should be interpreted on a case-by-case basis, apparently requiring resort to extrinsic evidence in *every* instance. However, Treasure Valley Concrete deals solely with the issue of whether, for the purposes of a statute (I.C. § 47-701) reserving to the state

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[2] Not surprisingly, the decisions from other jurisdictions upon which the Court relied in Stucki explicitly involved the meaning of the word "surface." Shell Oil Co. v. Moore, 382 Ill. 556, 48 N.E.2d 400 (1943); Jividen v. New Pittsburg Coal Co., 45 Ohio App. 294, 187 N.E. 124 (1933); Riedt v. Rock Island Improvement Co., 521 P.2d 79 (Okla. 1974); Large v. T. Mayfield, Inc., 646 S.W.2d 292 (Tex. App. 1983). They have nothing to do with the extent of a reservation of "all minerals," as in this case.

[3] In briefing below, Ida-Therm asserted, incorrectly, that many of the decisions relied upon by Bedrock holding that geothermal resources were included in the meaning of "minerals" were based in part on the inclusion of the word "surface" in the deeds in those cases. In fact, as Bedrock showed below, this was not the case at all; the word "surface" was not included in any of the deeds or involved in the decisions. R., Vol. II, pp. 239-241.

"minerals" in lands owned by it, sand and gravel were included in the statutory definition of minerals. This Court's decision was based entirely on the fact that the statute was amended in 1986 to include sand and gravel in the definition of "minerals." The Court applied the rule of statutory construction that an amendment carries the presumption that the legislature intended the statute so amended to have a meaning different than before the amendment, and concluded that legislature must have intended before 1986 that the definition did not include sand and gravel. Thus, the decision is entirely a matter of statutory construction. It has nothing to do with reservations in mineral deeds not involving state lands, nor does it support the conclusion that a reservation of "all minerals" should be interpreted anew on a "case-by-case" basis for each conveyance based on extrinsic evidence.

E. The District Court correctly concluded that the Idaho Geothermal Resources Act, I.C. § 42-4002, is inapplicable.

Finally, Ida-Therm argues at length that the District Court should have "followed" the definition of geothermal resources contained in the Idaho Geothermal Resources Act, I.C. § 42-4002, and thereby held that the reservation of "all minerals" in the 1946 Bell Deed did not include geothermal resources. Plaintiffs below asserted in their Complaint that "[p]ursuant to Idaho law including I.C. § 42-4002(c), geothermal resources are not mineral resources or water resources." Complaint, ¶ 56; R, Vol. I, p. 16. While they are difficult to parse, Ida-Therm's arguments appear to be: (a) the definition of geothermal resources in I.C. § 42-4002 applies to those resources in all respects, including private conveyances; (b) because I.C. §§ 42-226 and 42-230 reference geothermal resources, geothermal resources "are ground waters owned by the State" and therefore are not minerals for purposes of a deed reservation (although this directly contradicts an allegation in the Complaint); (c) the legislative intent behind I.C. § 42-4002

supports broad application of the definition; and (d) I.C. § 47-701(1)'s definition of "mineral" (which now expressly includes geothermal resources) supports the conclusion that the term does not ambiguously include geothermal resources, as used in a deed reservation. None of these arguments has merit.

1. I.C. § 42-4002 is expressly limited to application within Chapter 40 of Title 42, and does not control the interpretation of terms in a private conveyance.

Idaho Code § 42-4002 is part of the Idaho Geothermal Resources Act, enacted in 1972, which created a permitting scheme for drilling geothermal wells. I.C. § 42-4002 states that its definitions are effective "[w]henever used in this act[.]" Of necessity, then, the definitions are not effective for application elsewhere.

Ida-Therm ignores this limiting language. Its reading would render the language meaningless, an improper statutory construction. Wright v. Willer, 111 Idaho 474, 476 (1986) ("Statutes must be read to give effect to every word, clause and sentence."); Hartley v. Miller-Stephan, 107 Idaho 688, 690 (1984) ("We will not construe a statute in a way which makes mere surplusage of the provisions included therein.").

While Ida-Therm focuses on the word "found" in I.C. § 42-4002(c), and the legislative history of the Idaho Geothermal Resources Act, the fact that the Act's definition of "geothermal resources" is *not* intended to be of general application (or application beyond the purposes of the Act itself at all) is made all the more clear by reference to another Idaho statute, I.C. § 47-701. It provides that, for the purposes of *its* chapter (reservation of minerals in conveyances of state lands), "[t]he terms "mineral lands," "mineral," "mineral deposits," "deposit," and "mineral right," . . . shall be construed to mean and include all . . .geothermal

resources[.]" Thus, for some purposes, the legislature has defined "minerals" to *include* geothermal resources.

The legislative history quoted by Ida-Therm is irrelevant in light of the unambiguous language of the Act limiting the application of its definitions. City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667 (1993) ("We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.").

To the extent the legislative history is of interest at all, it actually supports Bedrock's position. As quoted by Ida-Therm, the legislative history clearly reflects that the legislature only "claims the right to regulate of the development and use" of geothermal resources, and that the Act "provides for immediate regulation of geothermal resource exploration and development[.]" Conspicuously absent from these statements of intent is any reference to the intent to control the rights of parties to instruments of conveyance, or to affect conveyances that occurred before the creation of the Act. Thus, it is clear that that the legislature did not intent for the Act to affect the *ownership* of the right to develop a geothermal resource underlying a particular property (at least ownership established by contract before the enactment of the Act).

Ida-Therm next appears to suggest that, because the Idaho Geothermal Resources Act regulates several aspects of the development and production of geothermal resources, such as well abandonment, administrative procedures, penalties for regulatory noncompliance, and

unitization or integration[4], the Act and its definitions must as a result control geothermal resources in *every* aspect, including whether the term "minerals" in a deed reservation includes geothermal resources. Ida-Therm cites no authority for this proposition. In fact, a standard principle of statutory construction (combined with the clear limiting language discussed above) leads to the opposite conclusion. Idaho recognizes the rule of *expressio unius est exclusio alterius* - "where a constitution or statute specifies certain things, the designation of such things excludes all others." Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 639 (1978). By addressing in detail the regulation of several aspects of geothermal resource development and production – but not private conveyances of the rights to those resources or the interpretation of the instruments of such conveyances – the legislature indicated the intent *not* to control those subjects.

2. I.C. § 42-226 and § 42-230 are irrelevant.

Perplexingly, after asserting in its Complaint and arguing at length earlier in its briefing that geothermal resources are *sui generis* in all respects as a result of the definition contained in I.C. § 42-4002 and therefore not included in the term "minerals" in a deed reservation, Ida-Therm then inconsistently asserts that I.C. § 42-230 and § 42-226 applied together mean that all geothermal resources are *ground water*. It apparently suggests that as a result, I.C. § 42-4002 "applies" to all ground water, which to Ida-Therm appears to mean that it

[4] Ida-Therm displays its lack of understanding of the subject when it discusses at length I.C. § 42-4013, which provides for the forced integration of an area into a drilling unit for development under appropriate circumstances. This is a common measure in oil and gas development (see I.C. § 47-322, which contains a similar provision for oil and gas). Ida-Therm appears to suggest that the availability of integration somehow means that the definition of geothermal resources contained in I.C. § 42-4002 controls private conveyances of geothermal rights. In fact, integration statutes simply recognize that a resource may underlie more than one property, and a property owner who refuses to participate in the expense and risk of developing the resource should not be permitted a "free ride" and receive a pro-rata share of the proceeds of such development. Integration statutes such as I.C. § 43-4013 allow a regulator to impose reasonable conditions on the integrated development, including that the nonparticipating property owner will be subject to a penalty, to compensate the operator for the expense and risk, before receiving a pro rata share of the proceeds of a successful well. Integration has absolutely nothing to do with whether the Act controls interpretation of a private contract for the conveyance of rights in real estate.

controls conveyances of geothermal rights. It seems to reach this conclusion by virtue of the fact that I.C. § 42-230 "references directly to" I.C. § 42-4002. The significance of this is not clearly explained by Ida-Therm.

Ida-Therm's argument misapprehends I.C. § 42-230 and § 42-230. What they say, quite clearly, is: (a) that all ground water is property of the state; and (b) that *some* ground water may be included within the definition of geothermal resources and as a result must be regulated as such under the Idaho Geothermal Resources Act (but only those of a sufficiently high temperature). With this Bedrock has no quarrel. Any person who wishes to drill a well to exploit a geothermal resource must comply with the state's regulation of this activity as embodied in the Act. Again, however, this has nothing whatsoever to do with whether a reservation of "all the minerals" in a 1946 deed includes the rights to geothermal resources underlying the real property conveyed by that deed. As Bedrock has explained at length, the Act makes clear that its provisions, including its definition of geothermal resources, do not reach this subject. Even absent its clear limiting language, the Act's failure to address conveyances of geothermal rights in the slightest, while addressing regulation of the *development and production* of geothermal resources in detail, indicates an intent not to regulate the former subject.

Ida-Therm's argument that the various statutes it describes are *in pari materia* and that the purportedly "more specific statute" – which it contends is I.C. § 42-226 – should "control" over the more general statute is, bluntly, meaningless. First, the various statutes do not relate to the same subject. I.C. § 42-226 declares state ownership of ground water. I.C. § 42-230 describes some groundwater as geothermal resources and thus subject to regulation as such. I.C. § 42-4002 is part of a statutory scheme for the regulation of the development and production of geothermal resources. In short, they cover different subjects. Even if this were not the case, Ida-

Therm never clearly explains how I.C. § 42-226 is "more specific" than I.C. § 42-4002, what it is more specific about, and how it should "control" over I.C. § 42-4002. Its argument is unintelligible.

3. I.C. § 47-701 is relevant only insofar as it confirms that the definition of geothermal resources in I.C. § 42-2002 is limited in its application.

Finally, Ida-Therm argues that by including "geothermal resources" in its definition of "minerals," I.C. § 47-701 somehow shows that the term "minerals" does not unambiguously include geothermal resources. If "minerals" unambiguously included geothermal resources, Ida-Therm reasons, then there would be no need to mention geothermal resources in the definition contained in I.C. § 47-701.

Ida-Therm again misapprehends the meaning and purpose of I.C. § 47-701. Neither Bedrock nor the District Court relied on I.C. § 47-701 for the proposition that "minerals" unambiguously includes minerals. Rather, both only pointed to it as evidence that the definition of "geothermal resources" as non-mineral in I.C. § 42-4002 was limited in application to Title 42, Chapter 40. Moreover, I.C. § 47-701 is by its own terms limited in application to Title 47, Chapter 7. Neither Bedrock nor the District Court asserted otherwise. Abundant other authority exists for the proposition that the term "all minerals" when used in a deed reservation indicates the general intent to sever the surface and mineral estates and that geothermal resources are included in the mineral estate.[5]

[5] Ida-Therm again shows its lack of understanding when it argues: "Certainly, the district court would not also hold 'oil' or 'gas' to be a mineral?" In fact, most courts hold that the term "mineral" when used in a deed includes oil and gas. See n. 1, supra. This is consistent with the conclusion that reservation of all minerals indicates the intent to sever the surface estate from all commercially valuable substances separate from the soil which may be removed from the property.

F. The statute relied upon by Ida-Therm may not be applied retroactively to change rights established under a preexisting contract or deed.

In asserting that the Geothermal Resources Act passed twenty six years after the 1946 Bell Deed was created controls the outcome of this case, Ida-Therm ignores entirely the prohibition against the retroactive application of statutes to vested contract rights.

Statutes may not be applied retroactively unless they clearly provide for such effect. State v. Daicel Chem. Indus., Ltd., 141 Idaho 102, 105 (2005) (quoting Idaho Code § 73-101), which provides, "No part of these compiled laws is retroactive, unless expressly so declared."); Ford v. City of Caldwell, 79 Idaho 499, 508 (1958) ("Before a statute will be given retroactive and retrospective effect, the statute itself must contain words which indicate the Legislature intended it to have such retroactive and retrospective effect."), quoting Application of Boyer, 73 Idaho 152, 158 (1952).[6] The statutes upon which Ida-Therm relies make no such declaration.

Even if this were not so clear, retroactive application of the statute to modify preexisting contract rights would be unconstitutional. A statute affects *substantive* rights and may not be applied retroactively if it would alter the "'legal effect' of previous transactions or

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[6] See also INS v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001) ("[A] statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective . . ."). The United States Supreme Court has also stated that the "presumption against retroactive legislation is deeply rooted in our jurisprudence." Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994).

events." Engen v. James, 92 Idaho 690, 695 (1969).[7] This prohibition is based in Article I, § 16 of the Idaho Constitution, which provides that "[n]o . . . law impairing the obligation of contracts shall ever be passed," and by Article I, § 10 of the United States Constitution which provides: "No state shall . . . . pass any . . . . law impairing the obligation of contracts[.]" It has been interpreted to protect "those contractual obligations already in existence at the time the disputed law is enacted." Lindstrom v. District Bd. of Health Panhandle Dist. I, 109 Idaho 956, 961 (Ct. App. 1985); see also In re Fidelity State Bank, 35 Idaho 797, 810 (1922) ("Legislation that attempts to make material alterations in the character, terms, or legal effect of existing contracts is clearly void."); Kansas v. Colorado, 533 U.S. 1, 20 (2001) ("It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made."); Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767, 2 Gall. 105 (1814) (Story, J.) ("Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.").

The statutes upon which Ida-Therm relies do not relate to private conveyances, but to permitting of geothermal wells and leasing of geothermal rights on State and school lands. The statutes themselves expressly state that their definitions are only applicable to the subjects

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[7] Compare State v. Daicel Chem. Ind., 141 Idaho at 105 ("A statute that is procedural or remedial and does not create, enlarge, diminish, or destroy contractual or vested rights is generally held not to be a retroactive statute, even though it was enacted subsequent to the events to which it operates."). Application of the statutes upon which Appellants rely would clearly enlarge or diminish "contractual or vested rights," by changing the scope of the conveyance in the 1946 Bell Deed. A contract's rights are "vested" when the contract is entered into, not when a claim is made to enforce it. See, e.g., Prudential Property & Casualty Insurance Co. v. Scott, 161 Ill. App. 3d 372, 381-82, 514 N.E.2d 595 (1987) ("It is well settled that a party's rights under a contract become 'vested' for the purposes of the retroactive application of a statute when the contract is entered into rather than when the rights thereunder are asserted.").

they regulate. As such, they are facially inapplicable to this dispute. Even if this were not so, the statutes could not be applied retroactively to alter rights vested at the time the 1946 Bell Deed was executed and delivered.[8] The statutes did not exist at the time of the 1946 Bell Deed, so the grantors under the deed cannot be said to have acted with them in mind at the time the deed was created.[9]

In short, either the reservation contained in the 1946 Bell Deed included geothermal resources, in which case the statutes cannot be applied retroactively to change that contractual reservation of rights, or the reservation did not include geothermal resources as a matter of contract law, in which case the statutes are irrelevant. Thus, Ida-Therm's statutory argument is a red herring. As set forth above, the clear weight of authority indicates that geothermal resources should be included in the definition of "minerals" for purposes of interpreting a deed reservation.

VII. Conclusion.

For the above reasons, the District Court's judgment should be affirmed.

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[8] Ida-Therm argued below that the application of a statute enacted in 1972 to determine the parties' rights in a deed created in 1946 would be merely "remedial." However, it then admitted that the District Court would be "applying the statute to determine who the geothermal rights belong to." Plaintiffs' Opposition Brief, p. 21; R, Vol. I, p. 213. This would be exactly what is prohibited – retroactive application of a statute to affect rights established under preexisting contracts. Engen v. James, 92 Idaho 690, 695 (1969).

[9] It is entirely consistent, however, to conclude that as the owners of the rights to exploit the geothermal resources underlying the property, the Bell heirs and their lessees must comply with the permitting and other regulatory requirements of the Geothermal Resources Act. Imposing permitting and other regulatory requirements as conditions to the *development* of the geothermal resources does not deprive them of their vested contract rights.

DATED this 28th day of February, 2012.

MARCUS, CHRISTIAN, HARDEE & DAVIES, LLP

By _____
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Attorneys for Defendant-Counterclaimant-
Respondent, BEDROCK GEOTHERMAL, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2012, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** in the above-referenced matter by the method indicated below, and addressed to the following:

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